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No. 79-1329

In the Supreme Court of the United States

OCTOBER TERM, 1979

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

WALTER TANTZEN, INC., AND INSURANCE COMPANY OF NORTH AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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Respondents urge the Court to deny the Director's petition on the basis of two procedural objections to further review and a substantive argument that the court of appeals expressly declined to consider. Remarkably, respondents offer no defense of the court of appeals' erroneous holding that claimant Shaughnessy's entitlement to benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, is dependent upon respondent Tantzen's satisfaction of the definition of "employer" in Section 2(4) of the Act.

1. Respondents contend that the Court should deny the petition because of the "inadequacies in the record" (Br. in Opp. 5). The court of appeals' criticism of the record, however, concerned the alleged dearth of evidence on the question whether Shaughnessy satisfied the so-called "status" requirement in Section 2(3) of the Act, 33 U.S.C.

902(3). The court of appeals thought that the administrative law judge and the Benefits Review Board did not conduct a sufficiently detailed inquiry into the nature of Shaughnessy's work and the nature of "longshoring operations" generally. Without further investigation, the court suggested (Pet. App. 4a-5a & n.4), it would be "difficult, if not impossible," to determine whether Shaughnessy was a "longshoreman or other person engaged in longshoring operations" within the meaning of Section 2(3).

But, the court of appeals held (Pet. App. 6a-7a), such a determination was not necessary for the disposition of respondents' petition for review of the Board's decision because neither the administrative law judge nor the Board found that Shaughnessy or any other employee of respondent Tantzen worked "upon actual, as distinguished from statutorily defined, navigable water of the United States." Accordingly, the court ruled, respondent Tantzen was not a statutory "employer" within the meaning of Section 2(4) of the Act, and therefore Shaughnessy was not covered by the Act even if he was engaged in longshoring operations when he was injured. This is the decision that the Director now asks this Court to vacate and remand for reconsideration in light of *P.C. Pfeiffer Co.* v. *Ford*, No. 78-425 (Nov. 27, 1979). The supposed "inadequacies in the record" identified by the court of appeals did not relate to the question actually decided by the court and therefore provide no reason for a denial of review.

Indeed, when an employment-related injury occurs on a covered "situs" (as Shaughnessy's undisputedly did), the only relevant inquiry under the Act is the precise question the court of appeals found it unnecessary to answer: whether the claimant satisfies the "status" test, *i.e.*, qualifies as an "employee" under Section 2(3) of the Act.

The purpose of the remand sought by the Director is to afford the court of appeals an opportunity to reconsider in light of *Pfeiffer* its construction of the phrase "maritime employment" in Section 2(4) of the Act and then to address the question (Shaughnessy's "employee" status) that was the only one controverted by the parties below and is the only one dispositive of Shaughnessy's coverage under the Act. Whether the present record is adequate for judicial review of the Board's determination that Shaughnessy is an employee within the meaning of Section 2(3) has no bearing whatever on the need for review by this Court to correct the court of appeals' misinterpretation of Section 2(4).

2. Respondents further contend (Br. in Opp. 6-11) that the Director lacks "standing" to petition for a writ of certiorari in this case. In support of this proposition, respondents cite Section 21(c) of the Act, 33 U.S.C. 921(c), which provides that an appeal may be taken to a court of appeals by "[a]ny person adversely affected or aggrieved by a final order of the [Benefits Review] Board." That provision, respondents contend, bars the Director from seeking review in this Court. Section 21(c) is irrelevant in the present context, however, because it applies only to review in the courts of appeals. In this Court, review is governed by 28 U.S.C. 1254(1), which permits "any party" to a civil or criminal case to petition for a writ of certiorari. The Director was a party in the court of appeals[1] and is therefore entitled by statute to petition for review in this Court.

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[1]See *Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F. 2d 35, 42-43 n.5 (2d Cir. 1976), aff'd sub nom. *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977); *United Brands Co.* v. *Melson*, 569 F. 2d 214 (5th Cir. 1978).

Moreover, the cases on which respondents primarily rely, *Director, OWCP* v. *Donzi Marine, Inc.*, 586 F. 2d 337 (5th Cir. 1978), and *Fusco* v. *Perini North River Associates*, 601 F. 2d 659 (2d Cir. 1979), vacated and remanded, No. 79-759 (Jan. 14, 1980), are inapposite. In those cases it was the Director who sought review of a Board order in the court of appeals. The Second Circuit and the Fifth Circuit declared that the Director was not a party "adversely affected or aggrieved" within the meaning of Section 21(c). Even if correct,[2] those cases have no application here, where the employer and its insurer are the aggrieved parties who sought review in the court of appeals. The claimant and the Director prevailed before the Board, and respondents sought to overturn the Board's decision in the court of appeals, where the Director was named and participated as a party defending the Board's order. See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 256 n.11 (1977).

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[2]The Director believes that he is entitled to petition for court of appeals' review of a Board decision adverse to his position concerning the proper administration of the Act. As respondents concede (Br. in Opp. 7-9), several courts of appeals have recognized the Director's standing to seek review of an unfavorable Board decision in the context of the Black Lung Act, which incorporates the judicial review provisions of the LHWCA. See 30 U.S.C. 925(a)(4) and (5); 30 U.S.C. 932(a); *Director, OWCP* v. *Peabody Coal Co.*, 554 F. 2d 310 (7th Cir. 1977); *Director, OWCP* v. *National Mines Corp.*, 554 F. 2d 1267 (4th Cir. 1977); *Krolick Contracting Corp.* v. *Benefits Review Board*, 558 F. 2d 685 (3d Cir. 1977); *Director, OWCP* v. *Alabama By-Products Corp.*, 560 F. 2d 710 (5th Cir. 1977); *Director, OWCP* v. *Eastern Coal Corp.*, 561 F. 2d 632 (6th Cir. 1977). The question whether, under the LHWCA, the Director independently may obtain court of appeals' review of Board decisions with which he disagrees is currently being litigated in a number of circuits and ultimately may require this Court's attention. That question, however, is not presented here, where the Director defended the Board's order in the court of appeals and continues to defend it in this Court.

Although aware of several prior challenges to the Director's right to party status in cases under the Act, this Court has recognized the Director's capacity to petition for certiorari. Ten days after discussing in *Caputo* the propriety of the participation of the Director in the court of appeals (432 U.S. at 256 n.11), this Court, on a petition for certiorari filed by the Director alone without participation by the claimant, vacated the court of appeals' judgment in *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F. 2d 533 (5th Cir. 1976), and remanded for further consideration in light of *Caputo*. See *Director, OWCP* v. *Jacksonville Shipyards, Inc.*, 433 U.S. 904 (1977), aff'd on remand, 575 F. 2d 79 (5th Cir. 1978), cert. denied, 440 U.S. 967 (1979).

A year later, the Court again considered a petition for certiorari filed by the Director, this time in a case in which the Director challenged the result reached by the Board (and affirmed by the court of appeals). *Director, OWCP* v. *Rasmussen*, 436 U.S. 955 (1978). The Court granted the petition without expressing any doubts about the propriety of the Director's status in the case, even though the petition itself (77-1465 Pet. 2 n.1) directed the Court's attention to the issue. It may be that the Court in *Rasmussen* thought it unnecessary to address the question of the Director's standing because the affected employer and insurer also petitioned for a writ of certiorari to review the decision of the Board and the court of appeals (No. 77-1491). Even if that is the explanation for the treatment of the Director's petition in *Rasmussen*, however, and even if there may remain some question about the propriety of the Director's petitioning by himself to challenge a Board ruling sustained by the court of appeals, it is clear that, in circumstances like those presented in *Jacksonville Shipyards* and the present case, the Director ought to be permitted independently to

seek review in this Court of a court of appeals' decision *overturning* an order of the Board.

The Director is the official in the Department of Labor responsible for the general administration of the LHWCA. See 33 U.S.C. 939; 20 C.F.R. 701.201-701.203. Frequently, a court of appeals' panel will set aside the Board's ruling in favor of a claimant in a case (such as the present one) where the financial incentive for the claimant himself is insufficient to justify a petition for certiorari. If the Director cannot appear in this Court to defend the Board's decision in such cases, the court of appeals' panels would establish the law for their circuits in a manner effectively immune from further review. The statutory questions involved would thus be settled for the circuits, and there would be no way for the Director or the Board to correct the problem before other injured claimants were improperly denied benefits. Congress surely did not intend such a result when it enacted the LHWCA and, despite respondents' assertions, there is no serious question about the standing of the Director to defend the Board's rulings.

For these reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted and the case remanded for reconsideration in light of *Pfeiffer*.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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